JUDGMENT OF THE COURT
20 MAY 1976 [1]

Impresa Costruzioni Comm. Quirino Mazzalai v Ferrovia del Renon (preliminary ruling requested by the Tribunale di Trento)

Case 111/75

Summary

1. *Questions referred for a preliminary ruling — Jurisdiction of the Court — Limits. (EEC Treaty, Article 177)*

2. *Taxation — Legislation of the Member States — Harmonization — Turnover tax — Value-added tax — Chargeable event — Occurrence — Moment*
(Second Council Directive of 11 April 1967, Article 6 (4) on the harmonization of legislation)

1. Under Article 177, the Court of Justice has jurisdiction to give preliminary rulings concerning the interpretation of acts of the institutions of the Community, regardless of whether they are directly applicable.
It is not for the Court to appraise the relevance of questions referred under Article 177, which is based on a clear separation of jurisdictions and leaves to the national courts the task of deciding whether the procedure of a reference for a preliminary ruling is helpful for the purposes of the decision in the proceedings pending before them.
2. Article 6 (4) of the Second Council Directive of 11 April 1967 cannot be interpreted as permitting the moment when the service is provided to be identified with that when the invoice is issued or a payment on account is made if these transactions take place after the service has been carried out.

In Case 111/75

Reference to the Court under Article 177 of the EEC Treaty by the Tribunale di Trento for a prelininary ruling in the action pending before that court between

IMPRESA COSTRUZIONI COMM. QUIRINO MAZZALAI

and

FERROVIA DEL RENON

1 — Language of the Case: Italian.

on the interpretation of Article 6 (4) of the Second Council Directive of 11 April 1967 on the harmonization of legislation of Member States concerning turnover taxes — Structure and procedures for application of the common system of value-added tax (67/228/EEC), OJ, English Special Edition 1967, p. 16,

THE COURT

composed of: R. Lecourt, President, H. Kutscher and A. O'Keeffe, Presidents of Chambers, A. M. Donner, J. Mertens de Wilmars, P. Pescatore, M. Sørensen, Lord Mackenzie Stuart and F. Capotorti, Judges,

Advocate-General: G. Reischl
Registrar: A. Van Houtte

gives the following

JUDGMENT

Facts

The facts of the case, the procedure and the observations submitted under Article 20 of the Protocol on the Satute of the Court of Justice of the EEC may be summarized as follows:

I — Facts and procedure

In 1964, Impresa Costruzioni Comm. Quirino Mazzalai entered into a contract with Ferrovia del Renon SpA to carry out certain works. These were completed in 1967, but because of a difference between the parties as to the total cost of the works carried out, the final balance was not paid until 1973.

The Mazzalai undertaking took the view that this payment should be made liable to the value-added tax introduced in Italy as from 1 January 1973 in accordance with the provisions of the third paragraph of Article 6 and Article 76 of Decree No 633 of the President of the Republic of 26 October 1972, which provides that:

— 'Services shall be deemed to have been provided at the moment when the consideration is paid' (third paragraph of Article 6)
— 'The tax shall be applicable ... to the supply of goods and the provision of services after 32 December 1972.' (Article 76).

It therefore asked Ferrovia del Renon for reimbursement of the value-added tax. Ferrovia, however, contested both the fact that value-added tax was applicable in the present case and the corresponding reimbursement.

This case is at present pending before the Tribunale di Trento. During the proceedings the question whether the abovementioned provisions of the decree of the President of the Republic are in accordance with Community law was raised, that is, whether they are in accordance with Article 6 (4) of the Second Council Directive of 11 April 1967 on the harmonization of legislation of Member States concerning turnover taxes — Structure and procedures for application of a common system of value-added tax (OJ, English Special Edition 1967, p. 16) which provides:

'The chargeable event shall occur at the moment when the service is provided. In the case, however, of the provision of services of indeterminate length or exceeding a certain period or involving payments on account, it may be provided that the chargeable event shall already have occurred at the moment of issue of the invoice or, at the latest, at the moment of the receipt of the payment on account, in respect of the whole of the amount invoiced or received.'

By an order of 30 June 1975 entered in the Court Registry on 24 October 1975, the Tribunale di Trento stayed the proceedings and referred the following question to the Court of Justice for a preliminary ruling under Article 177 of the EEC Treaty:

'Is Article 6 (4) of the Second Council Directive of 11 April 1967 (OJ, English Special Edition 1967, p. 16) to be interpreted as meaning that, in the case of the provision of services and, in particular, contracts for works, the chargeable event occurs at the moment when the service is provided and that each of the Member States has continuing authority to identify the chargeable event with the issue of an invoice or with a payment on account, whether the issue of the invoice or the payment on account takes place before completion of the work or, as in the present case, they take place after the said completion?'

In accordance with Article 20 of the Protocol on the Statute of the Court of Justice of the EEC, written observations were submitted on behalf of the Mazzalai undertaking by Serafino Giammarco, on behalf of Ferrovia del Renon by Angelo Facchin, on behalf of the Government of the Italian Republic by the Ambassador, Adolfo Maresca, assisted by Ivo Maria Braguglia and on behalf of the Commission of the European Communities by its Legal Adviser, Rolf Wägenbaur, assisted by Eugenio de March, member of the Legal Service.

The Court, after hearing the report of the Judge-Rapporteur and the views of the Advocate-General, decided to open the oral procedure without any preparatory inquiry.

The Commission of the European Communities replied in writing to the questions asked by the Court.

II — Written observations submitted to the Court

According to the *Mazzalai undertaking* the Court of Justice has no jurisdiction to give judgment on the question submitted for a ruling in this preliminary case.. If the Tribunale di Trento has doubts as to the constitutionality of the national provisions in question, it must bring the matter before the constitutional court.

Furthermore, the question raised in the present case is irrelevant. According to the rules on turnover tax, as regards the provision of services, the tax should have been paid when the consideration was paid and to the extent to which that payment was made. Since turnover tax was abolished on 1 January 1973, subsequent payment for a service provided before that date cannot be subject to that tax and must therefore be made liable to value-added tax.

In substance, the doubt expressed by the Tribunale di Trento is unfounded. The

only contradiction between Article 6 of the Decree of the President of the Republic with the Community directive lies in the fact that the latter does not permit the chargeable event to be deferred until the moment of payment, after the service has been provided.

It seems clear that the purpose of the directive was above all to enable value-added tax to be charged on payments on account made before services have been provided and to enable value-added tax to be charged when invoices are issued, regardless of whether the services invoiced have been completed. But the directive certainly does not prohibit the moment when the liability to pay the tax arises, that is to say, the moment when the service is deemed to have been provided, from being the same as the moment when the consideration is paid and does not therefore prohibit the solution laid down in the Italian rules.

Nor would it be contrary to the directive to charge the new tax at the moment when payment is made, even if it were to be considered essential for Community purposes for the chargeable event to occur at the actual moment when the service is provided and for the liability to pay tax for the services provided before 31 December 1972 to arise from that moment. The legislature could, *inter alia,* have made such a situation wholly liable to value-added tax. It also chose that solution in order to prevent complications and easy tax evasion.

Lastly, Article 6 (4) of the directive refers only to contractual relations after the entry into force of the implementing provisions in the various countries.

After examining the Italian legislation on the matter, *Ferrovia del Renon* claims that the provision of services in question must be subject to turnover tax in accordance with the last paragraph of Article 90 of Decree No 633 of the President of the Republic which provides that:

'Liability, even though it be of a formal nature, arising from contractual relations entered into prior to 1 January 1970 [the date of the entry into force of Decree No 633 of the President of the Republic, as laid down by Article 94] shall remain unaltered for the taxes referred to in the present article'.

These taxes include turnover tax.

The statement that, as regards turnover tax, liability to pay the tax arises at the moment when payment for the services is made does not appear justified. In fact, a distinction must be made between the moment at which the liability to pay the tax arises and that at which the liability of the taxpayer actually to pay the tax to the public revenue takes effect. The chargeable event giving rise to turnover tax occurred at the moment when the contract was made and the services were provided, even if that tax had to be paid at the moment when payment for the services provided was made. The date on which payment of the tax becomes due must not be confused with the reason which gives rise to the payment.

The entry into force of a new tax cannot alter the substance of a liability which has already arisen. This principle is conformed specifically by the last paragraph of Article 90 of the abovementioned Decree No 633 of the President of the Republic: liability to pay turnover tax which arose before 1 January 1973 must in any case be discharged when the taxpayer's liability actually to pay the tax to the public revenue arises, on the basis of the rules on turnover tax which have been expressly kept in force as a transitional measure.

That interpretation is not incompatible with Article 6 (4) of the directive which refers to services provided after 1 January 1973, as laid down by Article 76 of the transitional provisions, under which value-added tax is introduced as from 1 January 1973 and applies ... to the

provision of services after 31 December 1972.

The Community rules confirm that interpretation. First, the date for the application of the system of value-added tax in Italy was fixed at 1 January 1973. As regards the provision of services, Article 6 (4) of the Second Directive makes the chargeable event coincide with the moment when the service is provided, but this moment may in certain cases be deferred or moved to a later date. As regards services provided after 1 January 1973 that directive therefore enables the moment when the chargeable event occurs to be fixed at different dates but that possibility may never be applied to services provided before 1 January 1973.

The *Government of the Italian Republic* considers that the conclusion may de drawn from the case-law of the Court of Justice, especially in its judgments in Cases 9/70 *Franz Grad* v *Finanzamt Traunstein* [1970] ECR 825 and 41/74, *van Duyn* v *Home Office* [1974] ECR 1337, that on the one hand, the Court, relying upon Article 177 of the EEC Treaty, confirms that Community measures other than regulations may, in certain cases, be directly applicable and, on the other hand, that it states that the procedure under Article 177 must be concerned with a directly applicable Community measure.

In fact, if the Community rule were not directly applicable in the national legal system, and if, consequently, the national court could not apply it, the interpretation given by the Court would be ineffective.

Although in general it is possible to distinguish between the aspect of the rule concerned with its direct applicability and the part which relates to its interpretation, the first stage of interpretation consists precisely in examining whether the rule is directly applicable.

A reference for a preliminary ruling on a Community rule which is not directly applicable is admissible, but certainly irrelevant. The Italian Government considers, relying upon the general structure and function of Article 177, that in such a case the interpretative judgment of the Court must do no more than state that the rule is not directly applicable.

As regards, especially, coordinating directives, it may happen that the national law implementing the directive gives the court a margin of interpretation. In that case, an interpretation of the directive by the Court of Justice may be helpful to the national court 'so as to ensure that the law adopted for the implementation of that directive ... should be applied in a manner which conformed to the requirements of Community law' (see the judgment in the *Haaga* Case, 32/74, [1974] ECR 1201).

On the other hand, if the interpretation of the Court reveals that a national law is incompatible with the directive, the national court must nevertheless apply the national law. In such a case, the interpretation given by the Court is of no help in solving the problem before the national court.

In the present case, it is necessary in fact to examine whether the Community rule referred to by the national court is directly applicable. If the reply is in the negative, the judgment of the Court must, as has just been shown, merely state that the rule is not directly applicable without enlarging upon its meaning.

First of all, the Italian Government questions whether the Second Directive is compulsorily applicable to services provided under a contract to execute works. Under the directive, the delivery of movable property produced under a contract for work (Article 5 (2) (d)) or the delivery up of works of construction

(Article 5 (2) (e)) are considered as supplies of goods. It is true that the Italian Republic has used the power given in paragraph (5) of Annex A, that is to say, to classify such transactions in the category of provision of services. But Article 6 (2) specifies that the rules laid down with regard to the taxation of the provision of services shall be compulsorily applicable only to services listed in Annex B, which do not include those which stem from contracts to execute works or to execute works and supply materials therefor.

Consequently, if the services do not fall within either Article 5 or Article 6, it is necessary to conclude that the Second Directive does not apply to the services in question.

Although that statement makes any further analysis futile, the Italian Government nevertheless continues to examine the problem of the direct applicability of the rule in question.

The directives on value-added tax based on Articles 99 and 100 of the EEC Treaty constitute coordinating directives which, in general, do not contain directly applicable rules. The Member States may lawfully achieve the objective of a rule contained in a coordinating directive by employing various means. What matters is therefore that the result attained by the national rules as a whole is in conformity with the objective of the directive and not that each national rule is in conformity with the corresponding rule contained in the directive.

Consequently general appraisal of their conformity or otherwise can be reviewed only during, for example, a procedure such as that referred to in Article 169 of the EEC Treaty. That applies in any case to rules intended only to coordinate or harmonize.

As regards the provision referred to in the present case, it merely states the guiding criterion and provides for certain exceptions.

First of all, that rule is not intended to impose duties or prohibitions on Member States, still less duties or prohibitions to which subjective rights for individuals correspond. Further, the provision is neither clear nor precise. It states an obvious principle, that is to say, that the chargeable event occurs at the moment when the service is provided. However it leaves uncertain and does not specify when that moment occurs in each of the contractual or legal situations from which a provision of a service and consequently a transaction which must be made liable to value-added tax may result. The rule contained in Article 6 (4) amounts only to a guiding principle requiring several supplementary details.

Consequently, since that rule is not directly applicable in the sense that it does not confer subjective rights on individuals which national courts must protect, the Court must merely state that the question referred by the Tribunale di Trento has no purpose.

Nor would that conclusion be different if the fact were taken into consideration that the 'Community rules' are mentioned in Article 5 of Delegating Law No 825 of 9 October 1971 as rules with which the legislative body to which delegation is made must comply.

As a result of this reference provisions of the directives concerned have become provisions of national law and it is therefore for the national court alone to examine whether and within what limits the provisions contained in the directives have been incorporated into the national legal system and to interpret the contents of those provisions.

As for the actual question referred by the national court, the Italian Government emphasizes the difficulties for the Italian legislature stemming from Article 6 (4) of the Second Directive.

First, the very great variety of relations which must be made liable to

value-added tax as constituting the provision of services has made it extremely difficult, if not impossible, to fix in an abstract provision, the final moment at which each type of relation giving rise to the performance of a service is completed.

Secondly, the chargeable event, which is linked to the date when payment of the tax falls due, should have been specified at the moment when the taxable event is complete. It therefore seemed necessary on the one hand to adopt a legislative decision convering all types of contracts or *ex lege* duties giving rise to a taxable service and, on the other, to take account — also in order to determine the moment of taxation — of the consideration, an element fundamental to the completion of the taxable event itself.

Article 6 of Decree No 633 of the President of the Republic was adopted on the basis of the principle laid down by the Community rule and in order to fulfil the abovementioned requirements. Looked at as a whole and from the point of view of its structure, the system of value-added tax provides, in complete accordance with the Community criteria, that the tax consequences of the taxable transaction start to run at the moment when both the financial and economic effects of the transaction itself occur, which, on the other hand, constitute the basis of assessment (Article 8 (a) of the Second Directive; first paragraph of Article 13 of Decree No 633 of the President of the Republic).

Further, the Italian Government observes that the execution of Article 6 (4) of the directive has not been uniform or easily accomplished. In fact the matter in question, which is under review, has given rise to several disputes.

In conclusion, Article 6 of Decree No 633 of the President of the Republic, in that it fixes the moment when services are deemed to have been provided, is based on the fundamental criterion set out in Article 6 (4) of the directive in question but it goes further than this criterion in order to overcome the difficulties which have already appeared and to include in addition among the factors which determine the chargeable event payment of the consideration.

The *Commission* observes that under paragraph (8) of Annex A to the directive in question, the 'chargeable event' means the event giving rise to the tax. The chargeable event consists in a factual situation in which the tax rule creates the liability of a specific taxable person to pay tax. It depends upon the existence of a tax and is the necessary and sufficient pre-requisite for deciding, in each case, when the liability to pay the tax arises. Nevertheless the chargeable event does not exhaust the series of factors necessary for the purpose of determining the extent of the liability and must not therefore be confused with the date when payment of the tax falls due.

As regards the provision of services, Article 6 (4) of the directive specifies that the chargeable event shall occur at the moment when the service is provided and provides that in certain specific cases it is possible to derogate from the general rule. It is precisely the extent of that possibility given to the Member States which is the subject of the present question referred for a preliminary ruling.

The literal interpretation of this provision is enough to make clear that in the cases which have been restrictively prescribed, the Member States can only bring forward the moment when the liability to pay tax arises, by linking it to the issue of an invoice or the receipt of a payment on account in relation to the moment when the service is actually provided.

The adverb 'déjà' used in the French text emphasises that the moment to be taken into account is prior to the moment laid down by the general rule.

That conclusion is confirmed by a logical interpretation of the text: in accordance with commercial usage, certain contracts for services provide for payments on account before the service is completed; in case of provision of services of indeterminate length or over a long period, contracts may expressly give the person providing services the right to issue an invoice to the person placing the order for a varying part of the sum involved before the service has begun or before the service has been completed. Since in such cases a transfer of money takes place before the service has been provided, the directive gives the national legislations the opportunity to bring forward the date on which the liability to pay tax with regard to the sums in question arises; that however is without prejudice to the applicability of the rule that the liability to pay the tax can in no case arise after the service has been provided.

III — Oral procedure

The Government of the Italian Republic and the Commission of the European Communities presented oral argument at the hearing on 17 March 1976.

The Advocate-General delivered his opinion at the hearing on 6 April 1976.

Law

1 By an order of 30 June 1975, received by the Court Registry on 24 October 1975, the Tribunale di Trento referred to the Court of Justice for a preliminary ruling the question whether 'Article 6 (4) of the Second Council Directive of 11 April 1967 (OJ, English Special Edition 1967, p. 16)' must be interpreted 'as meaning that, in the case of the provision of services and, in particular, contracts for works, the chargeable event occurs at the moment when the service is provided and that each of the Member States has continuing authority to identify the chargeable event with the issue of an invoice or with a payment on account, whether the issue of the invoice or the payment on account takes place before completion of the work or, as in the present case, they take place after the said completion'.

2/3 The question has been raised in proceedings concerning the amount due either in respect of turnover tax or in respect of value-added tax on the balance paid in 1973 by Ferrovia del Renon, the defendant in the main action, to the Mazzalai undertaking, the plaintiff in the main action, for works in relation to the construction of the Bolzano-Sopra Bolzano cable railway completed in 1967. The plaintiff in the main action who had paid value-added tax at the rate of 12 % on the sum charged pursuant to the national legislation which entered into force on 1 January 1973, applied to the defendant in the main action for reimbursement of the tax paid, but encountered the objection that because the works had been carried out as

long ago as 1967, only turnover tax, which at that time was applicable at the rate of 4 %, could be taken into consideration.

4/5 In accordance with the Community directives, value-added tax was introduced in Italy as from 1 January 1973 in application of Delegating Law No 825 of 9 October 1971 (Gazzetta Ufficiale della Repubblica Italiana No 263 of 16 October 1971) and the corresponding Presidential Decree No 633 of 26 October 1972 (Gazzetta Ufficiale della Repubblica Italiana No 292 of 11 November 1972). Although Article 76 of this decree provides that the tax applies to the supply of goods and the provision of services (works carried out under a contract for works are treated as such) after 31 December 1972, the third paragraph of Article 6 provides that 'services shall be deemed to have been provided at the moment when the consideration is paid'.

6 During the procedure the Italian Government called in question both the relevance of the question to the outcome of the main action and the Court's jurisdiction, especially because, it claimed, on the one hand the Community rule, in the present case the Second Directive, is not directly applicable and cannot therefore produce direct effects, and, on the other, the proceedings are in substance concerned with problems of transitional law on which the Community rule is silent and which come only under national law.

7/9 Under Article 177, the Court of Justice has jurisdiction to give preliminary rulings concerning the interpretation of acts of the institutions of the Community, regardless of whether they are directly applicable. The question referred exclusively concerns the interpretation of Article 6 (4) of the directive and the Court therefore has jurisdiction. Furthermore it is not for the Court to appraise the relevance of questions referred under Article 177, which is based on a clear separation of jurisdictions and leaves to the national courts the task of deciding whether recourse to the procedure of a reference for a preliminary ruling is helpful for the purposes of the decision in the proceedings pending before them.

10/11 In addition, regardless of the effects of the directive, in cases such as the present, an interpretation of the directive may be helpful to the national court so as to ensure that the law adopted for the implementation of the directive is interpreted and applied in a manner which conforms to the requirements of Community law *(Friedrich Haaga GmbH,* Case 32/74, [1974] ECR 1201). The same may be true of the problems of transitional law raised by the proceedings.

12/14 As for the question raised, under Article 6 (4) of the Second Council Directive of 11 April 1967 on the harmonization of legislation of Member States concerning turnover taxes — Structure and procedures for application of the common system of value-added tax 'The chargeable event shall occur at the moment when the service is provided. In the case, however, of the provision of services of indeterminate length or exceeding a certain period or involving payments on account, it may be provided that the chargeable event shall already have occurred at the moment of issue of the invoice or, at the latest, at the moment of the receipt of the payment on account, in respect of the whole of the amount invoiced or received'. Whilst the first sentence of the paragraph lays down the general rule, the second sentence makes provision for the possibility of certain derogations from that rule. These derogations apply, however, only to cases in which payments on account are made before the service or services have been fully provided and therefore envisage only an anticipation of the moment when, according to the first sentence, the tax is payable.

15/16 On the contrary, the paragraph in question makes no mention of the possibility of deferring that moment beyond the moment when the service or services are provided in full. Consequently, national provisions which make the moment when the service is provided coincide with that when the consideration is paid go beyond the limits laid down by the paragraph in question.

17 Therefore it is necessary to reply that Article 6 (4) of the directive cannot be interpreted as permitting the moment when the service is provided to be identified with that when the invoice is issued or a payment on account is made if those transactions take place after the service has been carried out.

Costs

18 The costs incurred by the Government of the Italian Republic and the Commission of the European Communities, which submitted their observations to the Court, are not recoverable.

As these proceedings are, in so far as the parties to the main action are concerned, in the nature of a step in the action pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT

in answer to the question referred to it by the Tribunale di Trento by order of 30 June 1975 hereby rules:

Article 6 (4) of the Second Council Directive of 11 April 1967 on the harmonization of legislation of Member States concerning turnover taxes cannot be interpreted as permitting the moment when the service is provided to be identified with that when the invoice is issued or a payment on account is made if these transactions take place after the service has been carried out.

Lecourt Kutscher O'Keeffe Donner Mertens de Wilmars

Pescatore Sørensen Mackenzie Stuart Capotorti

Delivered in open court in Luxembourg on 20 May 1976.

A. Van Houtte
Registrar

R. Lecourt
President

OPINION OF MR ADVOCATE-GENERAL REISCHL DELIVERED ON 6 APRIL 1976 [1]

Mr President,
Members of the Court,

The Ferrovia del Renon in Bolzano and the Mazzalai firm in Trento entered into an agreement in 1964 pursuant to an invitation to tender for the construction of a suspension cable railway near Bolzano. The construction work was completed in 1967; moreover, some of the instalments were paid until completion. Differences later arose concerning *inter alia* the total costs and the outstanding balance thereof. The dispute was settled by an enforceable decision of the Appeals Court in Trento of 10 December 1972, in which the outstanding balance was quantified. This

1 — Translated from the German.